

NO. 21,075 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

P. UNTALAN, as administrator)
the Estate of TRINIDAD T. CALVO,)
deceased, and LUIS P. UNTALAN, as)
co-administrator of the)
Estate of ISMAEL T. CALVO, deceased,)
VICENTA T. CALVO,)

Appellants)

vs.)

PAUL M. CALVO, PAUL M. CALVO, as)
Administrator of the Estate of)
RICHARD T. CALVO, deceased,)
RICHARD M. CALVO, THOMAS J. M.)
CALVO, VERONICA M. CALVO and)
RICHARD T. CALVO,)

Appellees)

Brief for
Appellants
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Appeal from Order Civil Case No. 112-65

District Court of Guam

Territory of Guam

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUIS P. UNTALAN, as administrator)
 of the Estate of TRINIDAD T. CALVO,)
 deceased, and LUIS P. UNTALAN, as)
 ancillary administrator of the)
 estate of ISMAEL T. CALVO, deceased,)
 and VICENTA T. CALVO,)

Appellants)

vs.)

PAUL M. CALVO, PAUL M. CALVO, as)
 administrator of the Estate of)
 GUARDADO T. CALVO, deceased,)
 EDWARD M. CALVO, THOMAS J. M.)
 CALVO, VERONICA M. CALVO and)
 RICARDO T. CALVO,)

Appellees)

On appeal from the District Court of Guam for the Unincorporated Territory of Guam.

BRIEF FOR APPELLANTS

JURISDICTION

Jurisdiction of the District Court of Guam is based on 48 U.S.C., Section 1424. Jurisdiction of this appeal in this court is based on 28 U.S.C., Sections 1291 and 1294. The complaint (R 1) and amended Count I of complaint (R 14) are the pleadings which show the existence of jurisdiction of the District Court of Guam over this action. The notice of appeal (R 27) is the pleading which shows the existence of the jurisdiction of this court to review the judgment appealed from.

STATEMENT OF THE CASE

A. The facts.

Appellants, Luis P. Untalan, as administrator of the estate of Trinidad T. Calvo, deceased, and Luis P. Untalan, as ancillary administrator of the Estate of Ismael T. Calvo, deceased, on November 8, 1965 filed Complaint for Dissolution of Partnerships, for Accounting and Discovery of Assets (R 1) of two partnerships, viz: (1) Tomas A. Calvo & Sons, composed of Trinidad T. Calvo (now deceased), Eduardo T. Calvo (now deceased) and Ricardo T. Calvo (Count I of R 1); and (2) Stud-Pac Motor Company, composed of the three partners comprising the partnership of Tomas A. Calvo & Sons, in addition to Ismael T. Calvo (now deceased) (Count II (2) of R 1); or in the alternative, composed of Ismael T. Calvo (now deceased), Eduardo T. Calvo (now deceased) and Ricardo T. Calvo (Count II (3) of R 1). The amount in controversy under each count of said complaint exceeded \$2,000.00 exclusive of costs and interest (Count I (1)(4) and Count II (1)(8) of R 1).

Appellees filed motion to dismiss said complaint on January 18, 1966 (R 12) because of misjoinder (Paragraph 1 of R 12), failure to join indispensable parties (Paragraph 2 of R 12) and lack of jurisdiction, because claims of said appellants belonged in the estates of Eduardo T. Calvo, deceased or Ismael T. Calvo, deceased. The motion was sustained as to Count I of the complaint on the ground that indispensable parties were not joined and denied as to Count II of the complaint (Tr. page 11, lines 1 to 14, inclusive). Thereupon appellants filed Amended Count I Complaint for Dissolution of Partnerships, for Accounting and Discovery of Assets (R 14), joining Daniel I. Calvo, Ralph M.



lvo, Bertha A. Toves, Barbara M. Edwards, Thomas G. Calvo, Rita C. Calvo and Vicenta T. Calvo as Guardian of the persons and estates of Victor T. Calvo and Mildred R. Calvo, minors, as voluntary plaintiffs (Count I(2) of R 14). Before any of said voluntary plaintiffs filed answers or appeared in this action the trial court scheduled a pre-trial conference for the purposes of determining the issues involved (Tr. 14 lines 2 to 7; Tr. 16 lines 1 and 2, 7, 8 & 9, 11 & 12). Appellants objected to the holding of the pre-trial conference before the involuntary plaintiffs had appeared or answered (Tr. 14, lines 20 to 23; Tr. 16 lines 3, 4, 5 & 6). On April 11, 1966 the court entered its Preliminary Order transferring the action to the Island Court of Probate for determinations in probate and for the exercise of its probate jurisdiction as a condition precedent to the jurisdiction of the District Court (R 21, first paragraph), further ordering:

"1. The above action, Civil No. 112-65, is transferred to the Island Court for the consideration of that Court and determination:

(a) Whether the Court has jurisdiction within the existing estates to grant any relief properly due.

(b) Whether the Court wishes to approve litigation on the part of the administrator and permit the administrator to charge the estate with costs of litigation.

(c) If the Island Court shall determine that the administrator shall be authorized to undertake such litigation and shall approve an action in the District Court, the case may be re-transferred to the District Court as to the Trinidad T. Calvo interest, but the administrator must file a second and different action as to any other estate." (R 21, bottom page 2 and top page 3).

Such transfer was made on the court's own motion at a pre-trial conference which was being held to merely determine the issues before the involuntary plaintiffs had appeared or answered. The court made statements in the pretrial order without any evidence in support of them; said statements are denied by appellants, who should be given the opportunity to offer evidence in support of their case. Appellants filed Notice of Appeal (R 27). Appellants contend that the District Court of Guam had jurisdiction of this action and that it had the duty to exercise said jurisdiction. The court cannot legally divest itself of said jurisdiction by transferring the action to an inferior court whose jurisdiction is limited, said inferior court not having jurisdiction to fully determine the controversies contained in said action. It is further urged that the Island Court of Guam has no jurisdiction to fully determine the rights of the involuntary plaintiffs who were joined at the insistence of the District Court of Guam. Certainly the Court is required to adjudicate the rights of the parties which it insisted on bringing into the action.

B. Order transferring action reviewable on appeal.

The order of the District Court of Guam in transferring this action to the Island Court of Guam for determination in probate and for the exercise of its probate jurisdiction as a condition precedent to the jurisdiction of the District Court is reviewable on appeal.

Muller vs. Reagh, 150 C.A. 2d 99; 309 P. 2d 826 holds that an order of the Superior Court transferring a cause to the principal court upon the ground that the superior court lacks jurisdiction is appealable. The court stated:



"...It happens that our reviewing courts have upon occasion entertained appeals from orders like the order here involved, notably in these cases: Weaver v. Pasadena Tournament of Roses Assn. (1948), 32 Cal. 2d 833 (198 P.2d 514), affirming a superior court order transferring a cause to a justice's court; Roberts v. Western Pac. R.R. Co. (1951) 104 Cal.App.2d 816 (232 P.2d 560), affirming an order transferring an action from the superior court in San Francisco to the municipal court of San Francisco (petition for a hearing by the Superior Court denied, p. 821). It is true that in neither of these cases do we find a discussion of the appealability of the order. That might mean that such a question did not occur to the court or it may mean that the court considered the appealability of the order too clearly manifest to require comment. We think the latter is the correct view..."

The court pointed out that in the case of Robinson v. Superior Court, 35 Cal. 2d 379, 218 P2d 10 (cited by defendant as authority for the proposition that mandamus was the proper remedy) the trial court decided that appeal was the proper remedy, although it allowed mandamus: "...True, the Supreme Court there entertained mandamus even though it decided there was a remedy by appeal. It did so in view of the fact that until then there had been no certainty whether or not the order there in question was appealable. It does not follow that whenever there is uncertainty an aggrieved party must pursue mandamus only..."

Said order of the District Court is final and appealable. (1) As to the estate of Trinidad T. Calvo (R 14) the District Court has lost control of the action in that it is discretionary with the Island Court as to whether or not the action will be retransferred to the District Court (R 21). (2) As to the estate of Samuel T. Calvo (Count II, R 1) the court has completely divested

ERRORS RELIED UPON

The following are the errors upon which appellants rely:

1. The District Court of Guam had jurisdiction of this action, was under the duty to try same and was not authorized to transfer same to the Island Court of Guam.

2. The District Court of Guam erred in finding that appellants, Luis P. Untalan, as administrator of the estate of Trinidad T. Calvo, deceased, and Luis P. Untalan, as ancillary administrator of the estate of Ismael T. Calvo, deceased, were empowered to file this action in the District Court of Guam because said administrators did not obtain the permission of the Island Court of Guam to do so.

3. The District Court of Guam erred in finding that its jurisdiction was dependent upon the precedent exercise of probate jurisdiction in the Island Court of Guam.

4. The addition of Vicenta T. Calvo as plaintiff and the other parties as involuntary plaintiffs gave the District Court of Guam jurisdiction over Count I (R 14) of this action, and required said District Court of Guam to adjudicate same.

5. The Court erred in transferring this action to the Island Court of Guam before the involuntary plaintiffs were served with process and allowed to answer in said action.

6. The District Court erred in transferring this action to the Island Court of Guam because that court does not have jurisdiction to settle the accounts of the parties or to afford the relief prayed for in the District Court of Guam.

7. The District Court of Guam erred in finding a mis-

complaint (R 1, Count II) for misjoinder.

ARGUMENT

1. The District Court of Guam had jurisdiction of this action, and under the duty to try same and was not authorized to transfer the same to the Island Court of Guam.

Section 62 of the Code of Civil Procedure of Guam reads:

"Original jurisdiction. Under Section 22(a) of the Organic Act of Guam the District Court of Guam has the original jurisdiction of a district court of the United States in all causes arising under the laws of the United States and has original jurisdiction in all other causes in Guam except those over which original jurisdiction has been transferred to and vested in the Island Court of Guam by Section 82 of this title. If it appears that an action or proceeding brought in the District Court is actually within the jurisdiction of the Island Court the District Court shall transfer it to the Island Court for hearing and termination.

Sections 82(4) and 82(5) of the Code of Civil Procedure of Guam reads:

"4. In all cases at law under the laws of Guam in which the demand, exclusive of interest and costs, or the value of the property in controversy does not amount to more than \$2,000, except cases which involve the legality of any tax, impost, assessment, toll or fine;

"5. In actions for dissolution of partnership, where the total assets of the partnership do not exceed \$2,000;"

It is clear from the above that the District Court of Guam has jurisdiction of the controversies contained in this action, since the amounts in controversy exceed the sum of \$2,000.00, exclusive of interest and costs, and the original jurisdiction therefor has not been transferred to the Island Court of Guam by said Section 82. It is also clear that the District Court of Guam

may transfer an action to the Island Court only when the action

ould have been filed in the Island Court of Guam in the first
stance.

Since the District Court of Guam has jurisdiction of this
ion it was under the duty to exercise that jurisdiction and
render a decision therein.

20 Am. Jur.2d 453: "Section 93. Duty to exercise jurisdic-
on. Generally, a court having jurisdiction of a case has not
y the right and the power or authority, but also the duty, to
ercise that jurisdiction, and to render a decision in a case
roperly submitted to it. It cannot properly decline to exercise
e jurisdiction merely on the ground of the motive or ulterior
ose of the plaintiff in bringing the suit. And state courts
e not free to decline the jurisdiction conferred upon them by
gress in cases based on federal statutes if such cases are
thin the scope of the ordinary jurisdiction of the state courts
prescribed by local laws...Failure of a court to adjudicate
its merits a case over whic.. it has jurisdiction may be ground
reversal, on appeal, or its duty to exercise its jurisdiction
be enforced by way of a mandamus proceeding..."

Sampsell vs. Superior Court, 32 C2d 763, 197 P.2d 739 held
at a writ of mandamus should issue to compel the Superior Court
Los Angeles County to hear an application for order awarding
itioner custody of child pending a divorce action. The court
ated: "...Mandamus is available to compel the court to give
ull hearing in the case before it, although it is not available
inform the trial court as to how it should rule with respect
the merits of the case. (Hilmer v. Superior Court, 220 Cal.
73 (29 P2d. 175))..."

"...In the early case of Temple v. Superior Court, 70 Cal.
(11 P. 699), this court held that mandamus should issue to
mpel a trial court to hear and determine a proceeding to have
erson adjudged guilty of contempt, although the trial court
d dismissed the proceeding 'on the ground of want of jurisdic-
on' because the case came within Code of Civil Procedure section
5. The court stated in that case that 'We have examined the

ord, and are of the opinion that the matter is within the jurisdiction of the court. The facts stated bring the case early within section 1210 of the Code of Civil Procedure, and under such circumstances the court cannot, by holding without reason that it has no jurisdiction of the proceeding, divest itself of jurisdiction, and evade the duty of hearing and determining it'..."

In State of Indiana ex. rel. Juan S. Lopez v. Alvina M. Bligrew et al., 174 N.E. 808, 74 A.L.R. 631, the court held that petitioner was entitled to a writ of mandate to compel defendants to allow him to file his verified petition for a writ of error tam nobis. The court stated: "...When a court has jurisdiction over a class of cases and one seeking relief invokes the jurisdiction of the court in the manner prescribed by law, the particular cause is, ipso facto, under the jurisdiction of the court and the court cannot refuse jurisdiction..."

2. The District Court of Guam erred in finding that appellants, Luis P. Untalan, as administrator of the estate of Trinidad Calvo, deceased and Luis P. Untalan, as ancillary administrator of the estate of Ismael T. Calvo, deceased, were not empowered to bring this action in the District Court of Guam, because said administrators did not obtain the permission of the Island Court of Guam to do so.

It is noted that the court made a finding that the permission of the Island Court of Guam was not obtained for filing of complaint in this action (R 21 middle page) on its own motion contrary to the law as stated in 20 Am. Jur.2d 455 as follows: "Section 94. Jurisdiction as dependent on application by party for relief. The general rule is that a court cannot undertake to adjudicate a controversy on its own motion; it can do this only when the controversy is presented to it by a party, and only if it is presented to it in the form of a proper pleading. A court has no power

ner to investigate facts or to initiate proceedings. Before
may act there must be some appropriate application invoking
judicial power of the court in respect to the matter sought
be litigated..."

No issue as to permission of the Island Court was raised by
ellees. Therefore the finding of the court should have no effect

It is well settled that if the acts of an administrator are
pursuance of and in accordance with law, he need not secure an
er of court to protect him in the discharge of his duties.

21 Am. Jur. 493: "Section 215. Necessity of Court Order for
ection.-If the acts of an administrator are in pursuance of,
in accordance with law, he need not secure an order of court
protect him in the discharge of his duties..."

To the same effect, see re Fulmer, 203 Cal. 693, 265 P. 920,
A.L.R. 430 in which the court stated: "...That some of the
ve-enumerated disbursements may have been made without prior
ction of the probate court is not necessarily fatal to their
owance. The sums of money paid out of taxes and necessary re-
rs are such expenses as the administrator must pay in the care
management of the estate. People v. Olvera, 43 Cal. 492; Re
s, 110 Cal. 494, 502, 42 Pac. 971; Re Smith, 118 Cal. 462, 466,
Pac. 701. In Re Smith, supra, it is stated to be 'the duty of
xecutor, without special direction of the court, to preserve
property of the estate, and he does not require leave of the
t so to do, and it is a question how far an order so obtained
l protect an administrator either in doing or in omitting to do
ething which might be deemed important. When the court is so
sulted the heirs are not specially cited, but on the settlement
the accounts of an executor they are called in and have a right
question the acts of the executor and to have an appeal to this
t upon any determination which may be made. The previous con-
t to the acts of the executor cannot limit their inquiry as to
lawfulness of the acts done or the duty of the executor to do
t which has been omitted. Ordinarily, it would determine the
sition of good faith, and quite often that is the only matter

sion. Still, the failure to obtain it does not render the expenditures made improper. The only result is, that the matter yet to be passed upon.' Application of this rule disposes of the contention of respondents that the court orders above referred to were void as being made ex parte and without the prior giving of notice. Payments made without a court order are made at the behest of the personal representative (Re Fernandez 119 Cal. 579, 119 Cal. 51, 51 Pac. 851); but, if the acts of an administrator are in pursuance of, and in accordance with, law, he need not necessarily secure an order of court to protect him in the performance of his duties (Re Bottoms, 156 Cal. 129, 133, 103 Pac. 849)..."

In Re Bottoms, 156 Cal. 129, 103 Pac. 849, the court held that an administratrix, whose intestate was a vendee under a contract for the purchase of land belonging to the estate of the deceased vendor, and who, in his lifetime, had purchased and obtained conveyances from some of the heirs of the vendor of their interests in the property, is not limited, in order to perfect title and secure possession of the land for the benefit of the estate of the vendee, to the proceedings to compel a conveyance of the land provided for by sections 1597 et seq. of the Code of Civil Procedure. If it was to the advantage of the estate of the vendee, she was justified in entering into an arrangement for the direct distribution of the land by the estate of the vendor to the heirs of the vendee, upon payment being made to the estate of the vendor. The fact that such payment was made without permission of the court would not render the expenditure improper, although its propriety would be subject to investigation at the time of the settlement of the accounts of the administratrix of the estate of the vendee.

Unquestionably the administrator of the two estates was authorized to bring this action and he did not have to secure per-

mission of the court to do so. Certainly the District Court of Guam does not have the power, on its own motion, to require such permission as a condition precedent to filing this action.

Section 571, Probate Code of Guam: "Duties of executor. Surviving partner. The executor or administrator must take into possession all the estate of the decedent, real and personal and collect all debts due to the decedent or to the estate. When, at the time of his death, a partnership existed between the decedent and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account to the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon application to the executor or administrator, the court or a judge thereof, whenever it appears necessary, may order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained."

Section 573, Probate Code of Guam: "Extent of power to sue and be sued. Actions for the recovery of any property, real or personal, or the possession thereof, or to quiet title thereto, and to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

11b Cal. Jur. 383, 384: "Section 961. Accounting and Partnership Suits.- Accounting is a relief incident to other suits which may be brought and maintained. The representative by his general authority may bring an action for an accounting of moneys appropriated from the estate, in which action he is the only necessary plaintiff. He may require accounting from or maintain an action for it against a former representative. Proceedings are also provided to compel an accounting by persons who have been

trusted with any part of the estate in trust for the executor administrator.

"The representative in the stead of the decedent may bring accounting suit against an agent of decedent.

"Suits against surviving partner.- The surviving partner of decedent is required to present an account to the executor administrator and pay over any balances due. The representative may maintain against the surviving partner any action which decedent could have maintained, as well as an action for an accounting.

"The jurisdiction vested in the probate court does not divest equity courts of their general jurisdiction over actions of this character..."

21 Am. Jur. 880: "Section 905. -Equitable Actions.-Usually, general equitable remedies are available to an executor or administrator seeking recovery of assets of the estate or their value. Thus, he may file a bill for discovery and accounting, and where the administration proceedings are being conducted in another court, invoke equitable relief against the threatened violation of a contract of the decedent involving secret manufacturing processes discovered by the decedent, and compel the delivery of a written instrument for cancellations in a proper case..."

Barber v. Superior Court, 43 Cal. App. 221, 184 Pac. 952 holds that an administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain a suit for an accounting against a former administrator; and in such action, the administrator is the only necessary party plaintiff.

3. The District Court of Guam erred in finding that its jurisdiction was dependent upon the precedent exercise of Probate jurisdiction in the Island Court of Guam.

The Island Court of Guam sitting as a probate court does not have the authority to settle and adjust accounts between a surviving partner and a representative of the deceased partner. Such juris-

controversy exceeds \$2,000.00. The jurisdiction of the Probate Court over the estates of deceased persons does not divest the District Court of Guam of its general jurisdiction as Court of Chancery. Sec. 571 Probate Code of Guam, page 12, supra.

20 Cal. Jur.2d 390: "...The probate court has no authority to settle and adjust the accounts between a surviving partner and the representative of the deceased partner; its power is limited to requiring the surviving partner to account..."

Andrade v. Superior Court, 75 C. 459, 17 P. 531 holds that the Probate Court has no authority to settle and adjust accounts between the surviving partner and the representative of the deceased. The court stated: "...The probate court has no authority to settle and adjust accounts between a surviving partner and the representative of a deceased one. Its power is limited to requiring the survivor to account..."

"...The court cannot settle and adjust the account. If satisfactory, this can only be done by a court of equity.

"In *Theller v. Such*, 57 Cal. 447, it was said the 'probate court has no more jurisdiction to provide for a partnership account and decree a balance, where the partnership has been dissolved by the death of a partner, than where it has been dissolved by any other cause'..."

"...If questions arise in the course of settlement of partnership affairs which cannot be adjusted without recourse to the courts, the probate court is not the forum in which such questions are to be solved, but, like other questions cognizable in courts of equity, they must be determined in the last-named courts..."

The court in *Griggs v. Clark*, 23 Cal. 427, held that an action of the nature of a suit in equity brought by William T. Clark, deceased, who in his lifetime was in partnership with the defendants, for the settlement of the affairs of a partnership, was precluded by pending proceedings in the Probate Court. The court stated:

...The defendants demurred to the complaint; the Court be-
overruled the same, and this is assigned for error. It is
tended, that the Probate Court, in which the proceedings for
settlement of the estate were pending, had acquired juris-
diction of the subject matter of the present action; and there-
e the demurrer should have been sustained. The jurisdiction
ted in the Probate Court does not divest the District Courts
their general jurisdiction as Courts of Chancery over actions
this character, as has been held by this Court. (Wilson v.
ch, 4 Cal. 362; Clark v. Perry, 5 Id. 58)."

Section 2431. Civil Code of Guam: "Right to wind up. Un-
s otherwise agreed the partners who have not wrongfully dis-
ved the partnership or the legal representative of the last
iving partner, not bankrupt, has the right to wind up the
tnership affairs: Provided, however, that any partner, his
al representative, or his assignee, upon cause shown may ob-
n winding up by the court."

4. The addition of Vicenta T. Calvo as plaintiff and the
er parties as involuntary plaintiffs gave the District Court
Guam jurisdiction over Count I (R 14) of this action, and re-
red said District Court of Guam to adjudicate same.

Appellees' motion to dismiss the named appellants' complaint
1) because indispensable parties were not joined was granted
. page 11, lines 8 to 11) on the theory that the partnership
reement (Exhibit A of R 1) conferred rights upon said indis-
sible parties which should be adjudicated by the District Court
Guam. (Tr. page 2, lines 16 to 26). The validity of that
tion of the agreement wherein Trinidad T. Calvo seeks to bequeath
assign his share in the partnership (last page Exhibit A of
4) can only be determined by the District Court of Guam -
Island Court in Probate has no jurisdiction to pass on the
validity of said provision and this action should not have been
nsferred to the Island Court sitting in probate for that

at (Tr. page 2, lines 23 to 26) the indispensable parties are
real parties in interest and appellants are out of court if
d provision contained in said agreement is valid, which was
the more reason for not transferring the action.

5. The Court erred in transferring this action to the Island
rt of Guam before the involuntary plaintiffs were served with
cess and allowed to answer in said action.

One of the alleged indispensable parties joined as a volun-
y plaintiff in this action - the others were joined as involun-
y plaintiffs - said involuntary plaintiffs were deprived of
ir respective opportunities to be heard by the precipitate trans-
to the Island Court of Guam, sitting in probate.

Having ordered that said alleged indispensable parties be
ned, no action should have been taken by the District Court
Guam, detrimental to said alleged indispensable parties before
y had entered their appearances in this action.

6. The District Court erred in transferring this action to
Island Court of Guam because that court does not have juris-
tion to settle the accounts of the parties or to afford the
ief prayed for in the District Court of Guam.

(See authorities and arguments under specification of error
3, supra, pages 13 to 15).

7. The District Court erred in finding a misjoinder of
ses of action in this action without receiving evidence there-
and in effect dismissing Count II of appellants' complaint
1, Count II) for misjoinder.

Appellants alleged (Count II, paragraphs 2 and 3, R 1) that
nidad T. Calvo, Ismael T. Calvo, Eduardo T. Calvo and Ricardo

Calvo entered into a partnership agreement under the firm name
style of Stud-Pac Motor Company and in the alternative that
partnership was composed of Ismael T. Calvo, Eduardo T. Calvo
Ricardo T. Calvo. Such alternative pleading is permissible
Federal Rules of Civil Procedure No. 8(d)(2). On the face of
d complaint, therefore, there was no misjoinder. Even if there
a misjoinder, the action should not have been dismissed, but
uld have been severed and tried separately.

Rule 21, Federal Rules of Civil Procedure: "Misjoinder of
ties is not ground for dismissal of an action. Parties may be
opped or added by order of the court on motion of any party or
its own initiative at any stage of the action and on such terms
are just. Any claim against a party may be severed and pro-
ded with separately."


CONCLUSION

For the reasons above stated, it is respectfully submitted
t the order appealed from should be reversed.

Dated, Agana, Guam

October 12, 1966

Respectfully submitted,


DAVID M. SHAPIRO
Attorney for Appellants

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this
ef, I have examined Rules 18 and 19 of the United States Court
ppeals for the Ninth Circuit, and that, in my opinion, the
going brief is in full compliance with those rules.


DAVID M. SHAPIRO
Attorney for Appellants

